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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

TRANSAMERICA LEASING, INC.,

Plaintiff and Appellant,

v.

BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY et al.,

Defendants and Respondents.

B183418

(Los Angeles County
Super. Ct. No. BC297668)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alan G. Buckner, Judge. Affirmed.

Flynn, Delich & Wise, Erich P. Wise and Michelle M. Gu for Plaintiff and Appellant.

Sims Law Firm and James S. Van Dam for Defendant and Respondent Burlington Northern and Santa Fe Railway Company.

Lee, Bazzo & Nishi, Ted M. Lee and Allison M. Hunt for Defendant and Respondent American Pacific Movers.

Morison-Knox Holden & Prough, William C. Morrison, Michael D. Prough and Philip D. Witte for Defendant and Respondent RLI Insurance Company.

Plaintiff seeks indemnity from defendants for attorney fees and costs it incurred in retaining independent counsel to defend it against an underlying action for personal injuries and wrongful death. On cross-motions for summary judgment the trial court concluded no actual conflict existed between plaintiff and defendants or their insurer in the underlying action which would justify plaintiff's retention of independent counsel. Plaintiff appeals from the judgment for defendants. We affirm.

FACTS AND PROCEEDINGS BELOW

Plaintiff Transamerica Leasing, Inc. (Transamerica) leased a trailer chassis used for transporting cargo containers to defendant Burlington Northern and Santa Fe Railway Company (Burlington). Burlington subleased the chassis to defendant American Pacific Forwarders, Inc. (American Pacific), a trucking company. American Pacific contracted with Jose Barajas to haul the chassis loaded with containers to a rail yard.

On his way to the yard Barajas collided with a passenger car driven by Alice Guest with her two children as passengers. Guest and one child were seriously injured; the second child was killed. The Guests filed a lawsuit for personal injuries and wrongful death against American Pacific, Burlington and Transamerica.¹

The lease agreement between Transamerica and Burlington contained an indemnity clause which stated: "[Burlington] will defend at its sole expense and indemnify and hold harmless Transamerica . . . from and against all losses, claims, demands, actions damages, liabilities, costs, expenses and fees whatsoever (including reasonable attorneys' fees) directly or indirectly arising or alleged to have arisen out of, or in any manner connected with the condition, use, operation or storage or possession of the [chassis] in [Burlington's] possession . . . except to the extent caused by the gross negligence or willful misconduct of Transamerica . . . or the breach by Transamerica of the warranty [the chassis met certain standards of manufacture]."

The agreement between Burlington and American Pacific also contained indemnity and insurance agreements. The indemnity clause not only covered Burlington, it also covered Transamerica as “equipment owner.” The agreement stated in relevant part: “[American Pacific] agrees to defend, hold harmless and fully indemnify . . . equipment owner . . . against any and all losses, damage or liability, including reasonable attorneys fees and costs . . . suffered by . . . equipment owner . . . arising out of [American Pacific’s] negligent or intentional acts or omissions” In the insurance clause American Pacific agreed to “provide legal defense” to Transamerica for any claim arising against American Pacific under the provisions of the indemnity agreement quoted above. Finally, American Pacific agreed to maintain a commercial automobile liability policy of “\$1,000,000 or greater” insuring Transamerica’s chassis and naming Transamerica as an additional insured “in fulfillment of its legal liability and contractual indemnities[.]”

Transamerica and Burlington tendered their defense of the Guest lawsuit to American Pacific whose insurer, RLI Insurance Company (RLI), accepted their defense without reservations. RLI retained the same attorney to represent all three defendants. Burlington did not object to this joint representation but Transamerica did.

When Transamerica learned it would be represented by the same attorney representing American Pacific it objected on the ground an attorney representing all three defendants would have a conflict of interest if, as seemed likely, the Guests’ damages exceeded American Pacific’s \$1 million insurance policy with RLI.² Transamerica demanded American Pacific and Burlington, jointly or severally, pay for independent counsel to represent it. Burlington and American Pacific, through RLI, rejected this demand on the ground no conflict of interest existed. Transamerica proceeded to retain

¹ The suit also named Barajas as a defendant. A police report concluded as between Barajas and the Guests, Barajas was 100 percent negligent in causing the accident.

² At the time Transamerica was unaware American Pacific had a \$4 million excess policy with RLI.

its own attorney whose fees were paid by its insurer, General Star Insurance Company (General Star).

Transamerica continued to insist it was entitled to independent counsel paid for by Burlington or American Pacific but, in a letter to Burlington, it offered to waive any conflict and allow the same counsel to represent it and American Pacific if Burlington “acknowledges that its acceptance of [Transamerica’s] tender of defense and liability includes any damages and expense incurred by [Transamerica] which are not covered and indemnified by RLI[.]” Burlington responded it “acknowledged its contractual obligation to Transamerica Leasing and will continue to honor same.” It pointed out, however, its obligations under the contract “are not called into play because [Transamerica’s] expenses, defense and indemnification are being provided by American Pacific Forwarders and its liability carrier, RLI.”

Approximately three months after this correspondence the attorneys representing Burlington and American Pacific acknowledged American Pacific’s \$1 million policy “may not be sufficient to cover the potential damages that may be awarded” to the Guests and “we believe it is prudent to put Transamerica’s insurer on notice that it may be subject to a secondary coverage request.” Counsel did not reveal the existence of American Pacific’s \$4 million excess policy.

Shortly after this acknowledgement the Guests agreed to mediation of their claims against the three defendants and RLI revealed for the first time the existence of American Pacific’s \$4 million excess policy. RLI contended, however, Transamerica was not an additional insured under the excess policy as it was under the commercial automobile policy.

The Guest case settled. Under the settlement agreement, RLI paid the Guests \$2.5 million on behalf of Burlington, American Pacific and Transamerica.

Following the settlement Transamerica brought this action against American Pacific and Burlington for indemnity and against RLI for bad faith on the theory these defendants breached their contractual and equitable duties to provide Transamerica with independent counsel in the Guest litigation. Transamerica sought damages of

\$40,088.81. On cross-motions for summary judgment the trial court found no actual conflict between the parties and ruled for defendants. Transamerica filed a timely appeal from the judgment.

DISCUSSION

For the reasons explained below the undisputed facts reveal no actual conflict between Transamerica and Burlington and American Pacific

When an insurer is providing the defense to two or more of its insureds it is not required to retain separate counsel unless there is an actual conflict of interest between the insureds.³ Such a conflict of interest occurs “whenever their common lawyer’s representation of the one is rendered less effective by reason of his representation of the other.”⁴ Therefore, if there was no conflict or only a *potential* conflict between Transamerica and American Pacific, RLI, their joint insurer, had no duty to retain separate counsel to represent them.⁵

Transamerica contends an actual conflict existed between it, Burlington and American Pacific due to the strong likelihood, later confirmed by RLI, that American Pacific’s \$1 million commercial automobile policy would be insufficient to cover the damages suffered by the Guests.⁶ This conflict did not arise “solely” because Transamerica was sued for an amount in excess of its policy limits.⁷ Rather the claim for an amount beyond American Pacific’s policy limit created a situation in which it was in the best interests of Burlington and American Pacific to place the blame for the accident

³ *Lehto v. Allstate Ins. Co.* (1994) 31 Cal.App.4th 60, 71.

⁴ *Spindle v. Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 706, 713.

⁵ *Lehto v. Allstate Ins. Co.*, *supra*, 31 Cal.App.4th at page 71.

⁶ At the time Transamerica demanded separate counsel RLI had not revealed the existence of the \$4 million excess insurance policy.

⁷ See Civil Code section 2860 which provides an insurer does not have a duty to provide its insured with independent counsel “solely because an insured is sued for an amount in excess of the insurance policy limits.”

on Transamerica and for Burlington to deny it had any duty under its indemnity clause beyond tendering Transamerica's defense of the Guest action to American Pacific—a duty it unquestionably performed. In contrast it was in the best interests of Transamerica not only to establish it was free of negligence but to establish the accident resulted from the negligence of Burlington or American Pacific or both. These contentions lack merit.

As to the first alleged conflict—placing the blame on Transamerica—we agree there was a *potential* for a conflict if, for example, evidence showed Transamerica's negligence in maintaining the chassis contributed to the accident. American Pacific's indemnity agreement only required it to indemnify Transamerica for “loss, damage, or liability, including reasonable attorneys fees and costs . . . arising out of [American Pacific's] negligent acts or omissions[.]” American Pacific had no duty to indemnify Transamerica for losses resulting from its own negligence. Similarly, Burlington's indemnity agreement excluded indemnity for losses resulting from Transamerica's “gross negligence or willful misconduct” or breach of a certain warranty described in the agreement.

The record, however, shows Burlington and American Pacific never claimed they were excused in whole or in part from their indemnity obligations due to Transamerica's negligence, willful misconduct or breach of warranty. To the contrary RLI wrote to Transamerica stating: “American Pacific does not deny liability in this matter and believes that [Transamerica] is negligence free and should be dismissed. . . . [American Pacific] does not deny fault for the accident, does not deny the duty to indemnify [Transamerica], and sees no negligence on the part of [Transamerica].” Burlington also confirmed in writing it saw “no evidence to demonstrate” liability on the part of Transamerica.

As to the second alleged conflict—Transamerica's interest in establishing the negligence of American Pacific and Burlington—we fail to see why Transamerica would have such an interest. If Transamerica was found not negligent either through summary judgment or trial Transamerica would be out of the case and the issue of indemnification

would be moot. The fate of American Pacific and Burlington would be of no concern to Transamerica.

Transamerica also contends it had a conflict of interest with Burlington because Burlington would not acknowledge it had a duty to indemnify Transamerica for liability arising from the Guest lawsuit. The evidence offered for this contention is a letter from Transamerica to Burlington asking Burlington to “acknowledge[] that its acceptance of [Transamerica’s] tender of defense and liability includes any damages and expense incurred by [Transamerica] which are not covered and indemnified by RLI . . .” and Burlington’s response which stated it “acknowledged its contractual obligation to Transamerica Leasing and will continue to honor same” but pointed out its obligations under the contract were not currently an issue “because [Transamerica’s] expenses, defense and indemnification are being provided by American Pacific Forwarders and its liability carrier, RLI.”

Burlington’s letter does not deny its duty of indemnification, it confirms it. Furthermore, even if Burlington had refuted its duty of indemnification this refutation would not have caused a conflict between Transamerica and Burlington in the Guest litigation. Transamerica and Burlington would have had the same interest—defeat the Guests’ claims or settle them as favorably as possible. If a jury found Transamerica liable to the Guests and Burlington refused to indemnify Transamerica, Burlington’s indemnity obligation would be litigated in a separate suit between Transamerica and Burlington, similar to the action presently before us. Such a suit would not involve American Pacific, RLI or the counsel RLI retained to represent the defendants in the Guest action.

For these reasons we conclude as a matter of law no conflict requiring appointment of separate counsel existed between Transamerica and Burlington and American Pacific.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

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JOHNSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.